United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

76-7216

ORIGINAL

To be argued by
WILLIAM G. SYMMERS

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P/S

United States Court of Appeals
FOR THE SECOND CIRCUIT

JOSEPH NAVIGATION CORPORATION,

Plaintiff-Appellee

against

ARTHUR HENRY CHESTER, EDINBURGH ASSURANCE CO., LTD., STUYVESANT INSURANCE COMPANY and THREADNEEDLE ASSURANCE COMPANY,

Defendants-Appellants,

AMETCO SHIPPING, INC.,

Intervening Plaintiff-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

APPELLANTS' REPLY BRIEF

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Cases Cited

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Statement

Plaintiff's brief makes no effort to dispute the incontestible facts outlined in appellants' brief demonstrating that plaintiff was guilty of want of due diligence and statutory violations in sending the JOSEPH H to sea, on

a long voyage in an unsafe and grossly unseaworthy state, without essential and requisite navigating officers and without putting in working order the essential electronic aids to navigation with which the vessel was equipped. Regardless of whether the "unless clearly erroneous" rule is applied to the trial court's conclusions in respect of negligence, it was clearly and manifestly erroneous to conclude that "negligence" of the unlawfully overworked master, standing prolonged watches alone on the bridge in violation of universally recognized safety regulations, and with indisputably essential present-day aids to navigation inoperative, was the sole and proximate cause of the loss of the ship.

I

Plaintiff's want of due diligence and unseaworthiness were the proximate, efficient causes of the loss.

Plaintiff appears to concede that if an unqualified person is "in charge of the navigation at the critical period", there would be no insurance coverage (Plaintiff's brief, p. 12). If plaintiff had put a known alcoholic in charge of navigating, this would not be a competent person and plaintiff would forfeit any coverage under the policies. See: *Lemar Towing, Inc.* v. *Fireman's Fund Insurance Co.*, 352 F. Supp. 652 (E.D. La. 1972), *aff'd, per curiam,* 471 F. 2d 609 (5th Cir. 1973), *cert. denied,* 412 U.S. 930 (1973). Whether the captain's senses be dulled by chronic alcoholism, or by fatigue from overwork imposed by the shipowner, involves a distinction without a difference so far as his competence at the critical period is concerned.

On proximate cause, plaintiff relies on Justice Holmes' dictum in *Queen Insurance Co. of America* v. *Globe and Rutgers Fire Insurance Co.*, 263 U.S. 487, 492 (1924) that

in construing marine insurance policies the courts' inquiries generally are to stop "with the cause nearest to the loss". Plaintiff argues the captain's "negligence" as the "cause nearest to the loss." This of course is a misconception of the rule, which, both before and since Mr. Justice Holmes' famous *dictum,* has been explained as a search for the *efficient cause,* which is not synonymous with the "direct" or "immediate" cause proximate in time (Appellant's brief, pp. 17-22).

II

The unlawfully overworked captain was neither rested nor competent at the critical moments.

Plaintiff's brief quotes the trial court's conclusion that

> There was no one more qualified to take the JOSEPH H through Bic Channel on the basis of dead reckoning than the master of the vessel . . . Indeed, it would appear that the master of the vessel was fully rested when he ordered the crew to weigh anchor and proceed through the channel (R. 122)

and contends that these "findings" are "fully supported by the evidence". The evidence referred to in plaintiff's brief, pages 6 and 7, is no more than that the captain, in the two or three days that the mate and chief engineer had known him, appeared to them to be in good health and had made no complaints to them. A few weeks after the stranding, Captain Cabezas died of cancer (R. 52, 291).

There was no evidence of the terminally ill captain's state of fatigue at the critical time of stranding on the morning of October 3rd, 1969, some two weeks after the

commencement of the difficult prolonged voyage from Milwaukee, and two days out of Montreal (not one day, as the Court below stated in its opinion). If the master, terminally ill with cancer, was not suffering from fatigue by the time of the stranding on October 3rd, after the long and not untroubled voyage starting at Milwaukee nearly two weeks before, he had more fortitude than an average man. There is no competent evidence that he was other than an illegally overworked, terminally ill man required by plaintiff to navigate in fog without benefit of any watch officer, and without operative radar or fathometer. Plaintiff offered no evidence to show that its statutory violation of safety requirements could not have caused or contributed to the loss. Discussing the Pennsylvania Rule, the Supreme Court, in *The Martello,* 153 U.S. 64, 74 (1894) said:

> There is a presumption which attends every fault connected with the management of the vessel, and every omission to comply with a statutory requirement, or with any regulation deemed essential to good seamanship.

No evidence in this case overcomes the presumption attending plaintiff's statutory violations. If the vessel had in fact been made seaworthy, by the shipowner's compliance with compulsory safety regulations (manning) and by maintenance of indisputably essential navigational equipment (radar and fathometer), the stranding could and would have been avoided.

III

Plaintiff's suggestion that the policy should have listed all essential aids to navigation requisite to seaworthiness as an express condition in the insurance contract is without merit.

Plaintiff urges a novel suggestion that in subscribing to standard policies of marine hull insurance, Underwriters should include a specific condition or warranty as to what equipment (e.g., radar, fathometer, radio direction finder, etc., etc.) should be installed in the vessel to make her seaworthy. This suggestion was accepted by the trial court, which said:

> If the defendants wish to include the requirement of latter-day technology, then the policy of insurance should have so provided (R. 123).

The impracticality of this suggestion should be apparent. Seaworthiness is a relative concept. "While seaworthiness is a comprehensive term requiring that the vessel be staunch and strong, fitted out with proper equipment and a sufficient and competent crew, it is also a relative term, relative to the type of voyage or service proposed." *Lemar Towing Inc.* v. *Fireman's Fund Insurance Co.*, 352 F. Supp. 652, 661 (E.D. La. 1972), *aff'd. per curiam*, 471 F. 2d 609 (5th Cir. 1973), *cert. denied*, 412 U.S. 930 (1973). In *The Southwark*, 191 U.S. 1, 8 (1903), the Supreme Court, quoting *Bouvier*, noted:

> "It can never be settled by positive rules of law how far this obligation of seaworthiness extends in any particular case, for the reason that improvements and changes in the means and modes of navigation frequently require new implements, or new forms of old ones; and these, though not necessary

> at first, become so when there is an established usage that all ships of a certain quality, or those to be sent on certain voyages or used for certain purposes, shall have them."

For Underwriters to be required to tailor each policy so as to itemize every essential aid to navigation requisite to seaworthiness is utterly impractical and unnecessary. An owner should know what is essential for the safe navigation of his ship for the particular service or voyage in which it is engaged.

IV

Plaintiff's reliance on classification of the "Joseph H" by the Bureau Vertias is misplaced.

Plaintiff in its brief seemingly takes comfort in the statement that the JOSEPH H was "classified by Bureau Veritas, having most recently been examined by a Bureau Veritas surveyor on September 21, 1969 at Milwaukee" (p. 3). Bureau Veritas, like its counterparts, Lloyd's Register of Shipping and the American Bureau of Shipping, is a privately owned society for surveying hulls, boilers and machinery of ships, and for issuing certificates attesting that they are built and maintained in condition according to requisite specifications. Nowhere in the Bureau Veritas annually published "Rules and Regulations for the Construction and Classification of Steel Vessels" is there any reference to inspection or certification of essential aids to navigation such as compass, radar or fathometer, or to certification of the adequacy or competency of officers or crew. There was no such certification. The survey at Milwaukee in September, 1969, related to boiler repairs (R. 325-326, Q. 32).

CONCLUSION

For the reasons stated in appellants' main brief, the judgment of the court below should be reversed.

Respectfully submitted,

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New York, N. Y.
25 August 1976.

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Stull Bill & Nash 8/26/76

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